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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION.

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JURISDICTION.

The first Federal question presented by this record is whether the Illinois Commerce Commission had power under Federal statutes to enter an order contrary to a previous mandatory order of the Interstate Commerce Commission (Petition, pp. 2, 23; Petitioner's Brief, pp. 29 and 37). Respondent contends this question was not properly raised in the trial court (Respondent's Brief, pp. 13-15). Assuming, without conceding, that this contention is cor-

rect, still the Illinois Appellate Court passed on the question by holding that respondent was not precluded from recovering reparation by any prior order of the Interstate Commerce Commission (R. 317). When the state appellate court passes on a Federal question, this court will not inquire whether it was properly raised. (*Home Insurance Company* v. *Dick,* 281 U. S. 397, 407; 74 L. Ed. 926, 933; 50 S. Ct. 338.) Therefore, if all respondent's statements were true, this question is still before this court and is alone sufficient to confer jurisdiction. However, this Federal question *was* raised in the trial court by notice of special defense filed with petitioner's pleas, and in the other ways mentioned in our original brief (Petitioner's Brief, pp. 29-30).

The remaining Federal questions are constitutional ones. Respondent (Respondent's Brief, pp. 8-9) undertakes to classify the methods by which constitutional questions may be raised under the Illinois practice. This classification omits the methods pursued by petitioner in this case, which are fully sanctioned by Illinois decisions.

The first constitutional question presented by the record is whether Illinois Commerce Commission had power under the commerce clause of the Federal constitution to award reparation contrary to a previous mandatory order of the Interstate Commerce Commission (Petition, pp. 2, 23; Petitioner's Brief, pp. 32, 37). This question goes directly to the jurisdiction of the Illinois Commerce Commission over the subject-matter. It involves not only individual rights, but matters of public policy. When an administrative body thus exceeds its jurisdiction, the constitutional question presented cannot be waived, under the Illinois practice (*Welton* v. *Hamilton,* 344 Ill. 82, 95-98; 176 N. E. 333, 338). Nevertheless, petitioner raised the question in the trial court by its notice of special defense, which

specifically stated that the Illinois Commission was "without power or jurisdiction" because of the Interstate Commerce Commission's decision, and by other methods stated in petitioner's brief (Petitioner's Brief, p. 32).

The second constitutional question is whether Illinois Commerce Commission had power under the due process and commerce clauses to award reparation on a rate it had previously approved (Petition, pp. 3, 23; Petitioner's Brief, pp. 32-33, 41). One way, among others, by which this question was raised was by introducing the previous order of the Illinois Commission in evidence (Petitioner's Brief, pp. 32-33). Respondent says that the question was not raised in one of the ways he prescribes (Respondent's Brief, p. 16). But offering evidence which would only be admissible if a certain statute is void raises the constitutionality of that statute (*People* v. *Sandberg Company*, 282 Ill. 245, 255; 118 N. E. 469, 473). So here, offering evidence which was only relevant to show that the reparation order was void, because in violation of the previous order, raises the constitutional question.

The third constitutional question is whether Illinois Commerce Commission has imposed a confiscatory rate, and thus denied petitioner due process of law (Petition, pp. 3, 24; Petitioner's Brief, pp. 33-35, 43). Respondent contends this question was not properly raised (Respondent's Brief, pp. 16-17). This question could only arise when the evidence before the Illinois Commerce Commission was before the court. Respondent was not obliged to, and did not, plead the evidence, and therefore petitioner could not raise the question in its pleas. After respondent had put the question before the court by introducing at the trial the entire record of the evidence and proceedings before the Illinois Commerce Commission, and petitioner had also introduced the entire record in its defense, the

sufficiency of that evidence to support the award was in issue (See Petitioner's Brief, p. 34). Petitioner presented the issue to the court for decision by its motion to find in its favor at the close of all the evidence (R. 266). This motion raised the question of the sufficiency of the evidence before the Illinois Commerce Commission and before the court, and was an appropriate means of testing the constitutionality of the Commission's award based on such evidence. It is the general rule in Illinois that a motion to find the issues in favor of a party, made at the close of all the evidence, presents all questions of law arising on the evidence (*Maxcy-Barton Organ Co.* v. *Glen Building Corp.* 355 Ill. 228, 230; 189 N. E. 326, 327. *National Can Co.* v. *Weirton Steel Co.*, 314 Ill. 280, 284; 145 N. E. 389, 390-391. *Pressed Steel Equipment Co.* v. *Thornburgh Pressteel Co.*, 312 Ill. 359, 366; 144 N. E. 6, 9). A motion presenting all questions of law raises questions of constitutional law, although it does not mention the constitution. Thus the Illinois Supreme Court has held, in the very case cited by respondent (Respondent's Brief, p. 8), that objections to instructions to the jury based on a statute challenged the constitutionality of the statute, although the objections did not specify constitutional grounds (*Christy* v. *Elliott*, 216 Ill. 31, 36-39; 74 N. E. 1035, 1038).

The contention of respondent (Respondent's Brief, p. 17) concerning the fourth constitutional question is sufficiently answered in petitioner's original brief (Petitioner's Brief, p. 47).

ARGUMENT.

PETITIONER HAS COMPLIED WITH THE RULES OF THIS COURT.

Respondent contends that the petition should be dismissed for failure to file a complete record, and cites Rule 38 of this Court (Respondent's Brief, p. 19). Respondent has evidently overlooked Paragraph 7 of Rule 38, which provides that "where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there." It has been the consistent practice of this court to accept abstract records, such as are used in Illinois, as a basis for consideration of petitions for certiorari in this court.

Furthermore, respondent has waived any objection to the sufficiency of the record by failing to file an additional abstract during the proceedings below. The constitutional questions urged here were presented to the Illinois Supreme Court by assignments of error. Rule 38 of that court makes it the duty of the appellant (petitioner here) to furnish a complete abstract of the record. This petitioner did, and that abstract is the record presented here. The rule further provides that the abstract "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part." Respondent did not file any further abstract, either on the original appeal to the Illinois Supreme Court or on petition to that court for certiorari, and therefore ac-

quiesced in the Illinois Supreme Court's use of petitioner's abstract as a sufficient basis for consideration of the identical errors now relied on.

Respectfully submitted,

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